Supreme Court, U.S.
FILED
NOV 21 1994
OFFICE OF THE CLERK

No. 94-719

In The

Supreme Court of the United States

October Term, 1994

PATRICIA BIRKBECK, as Personal Representative of the Estate of Alan Birkbeck, Deceased; J. C. RICHARDSON,

Petitioners,

v.

MARVEL LIGHTING CORPORATION; BRUCE T. FENNESSEY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

LOVIC A. BROOKS, III
(Counsel of Record)
KRISTINE L. THOMPSON

CONSTANGY, BROOKS & SMITH
Suite 810, NationsBank Tower
1301 Gervais Street
Columbia, SC 29201-3326
(803) 256-3200

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. Whether the Court of Appeals' affirmance of the District Court's grant of judgment as a matter of law pursuant to Rule 50, FRCP, based upon a finding of insufficient evidence to support a verdict conflicts with this Court's decisions or otherwise was in error?

II. Whether individual agents of an employer can be individually liable for monetary damages under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, for employment decisions made within the scope of their employment?

PARTIES

All parties are correctly identified in the Petition. Respondent Marvel Lighting Corporation is a wholly owned subsidiary of Marcliff Corporation. Neither corporation has related, affiliated, or subsidiary corporations other than wholly owned subsidiaries.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. REASONS FOR DENIAL OF THE PETITION ... 5

II. JUDGMENT AS A MATTER OF LAW FOR RESPONDENTS WAS PROPER BECAUSE PETITIONERS PRESENTED INSUFFICIENT EVIDENCE TO SUPPORT THEIR AGE DISCRIMINATION CLAIMS 9

III. MONETARY LIABILITY FOR AGENTS OF EMPLOYERS IS NOT PERMITTED UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT 12

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Bessemer City, 470 U.S. 564 (1985) ... 5, 7, 8

Ayala v. Mayfair Molded Products, Inc., 831 F.2d 1314 (7th Cir. 1987) ... 10

Brown v. Stites Concrete, Inc., 994 F.2d 553 (8th Cir. 1993) ... 10

Bunch v. Bullard, 795 F.2d 384 (5th Cir. 1986) ... 10

Freeman v. Package Machinery Co., 865 F.2d 1331 (1st Cir. 1988) ... 10

Frieze v. Boatman's Bank, 950 F.2d 538 (8th Cir. 1991) ... 11

Guthrie v. Tifco Industries, 941 F.2d 374 (5th Cir. 1991) ... 11

Harvey v. Blake, 913 F.2d 226 (5th Cir. 1990) ... 8

Hebert v. Mohawk Rubber Co., 872 F.2d 1104 (1st Cir. 1989) ... 10

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) ... 5

Merrick v. Farmers Insurance, 892 F.2d 1434 (9th Cir. 1990) ... 11

Miller v. Maxwell's Int'l, Inc., 991 F.2d 583 (9th Cir. 1993) ... 8

Padaway v. Palches, 665 F.2d 965 (9th Cir. 1982) ... 8

Phelps v. Yale Security, Inc., 986 F.2d 1020 (6th Cir. 1993) ... 11

St. Mary's Honor Center v. Hicks, 509 U.S. ___, 113 S.Ct. 2742 (1993) ... 5, 6

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND RULES

29 U.S.C. § 621 *et seq.* 2

29 U.S.C. § 630(b) 12

42 U.S.C. § 2000e *et seq.* 5

Rule 50, FRCP 3, 5, 6, 8

No. 94-719

In The

Supreme Court of the United States

October Term, 1994

PATRICIA BIRKBECK, as Personal Representative of the Estate of Alan Birkbeck, Deceased; J. C. RICHARDSON,

Petitioners,

v.

MARVEL LIGHTING CORPORATION; BRUCE T. FENNESSEY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Marvel Lighting Corporation and Bruce Fennessey, respectfully request that the Court deny the Petition for a Writ of Certiorari of Petitioners, Patricia Birkbeck[1] and J. C. Richardson.

[1] Patricia Birkbeck was substituted as a party for Alan Birkbeck who died during the pendency of this action. References hereafter to "Birkbeck" are to Alan Birkbeck.

STATEMENT OF THE CASE

Birkbeck and Richardson claim that Marvel and Fennessey terminated their employment with Marvel in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, ("ADEA"). They were employed by Marvel until March 1989, at which time their jobs were eliminated as a part of an economic reduction-in-force involving fifteen of Marvel's approximate two hundred employees. The economic reduction was caused by a "price war" being waged by three major corporations in the light bulb industry in which Marvel was attempting to compete. Fennessey, Marvel's vice president of manufacturing, made the final decision to eliminate the management positions of Birkbeck and Richardson.

Fennessey decided as a cost reduction measure to combine the production supervisor positions of Richardson, age 55,[2] and Doug Hayes, age 53. Fennessey tentatively decided to terminate Hayes and award Richardson the combined position, but he ultimately reversed this decision upon being advised by manufacturing manager, Harold Linskey, age 56, and plant manager, Dan Schiavo, age 65, that Hayes possessed mechanical and technical skills essential to the operations which Richardson did not possess. Also, Hayes had successfully performed both jobs during Richardson's extended leave of absence in 1987 and 1988. Richardson's termination by Fennessey forms the basis for his age discrimination claim.

---

[2] All ages reflect ages of individuals as of March 31, 1989.

Birkbeck was responsible for a manufacturing department which was experiencing problems to the point that Marvel could purchase the component being manufactured in this department from an outside supplier at a lesser cost. Fennessey decided to shut down operations in this department and eliminate the jobs of the employees, including Birkbeck. The one exception was that the department's group leader, Marvin Bethea, age 36, was retained for the purpose of conducting tests for plant manager Schiavo, who was assigned the responsibility by Fennessey to attempt to work out the problems in the department so that operations could be resumed at a later date. Fennessey wanted to resume operations because Marvel's outside source for the product was a major competitor. In fact, operations were resumed several months later, but were discontinued again a short time later due to the continued inability to produce the product in a cost efficient manner. Birkbeck's termination formed the basis for his age discrimination claim.

A trial on the merits was held in April 1993. The jury returned a verdict in favor of Petitioners on their claims of intentional age discrimination and a verdict in favor of Respondents on the claims of a willful violation of the statute.

Following the verdicts, the District Court for the District of South Carolina granted Respondents' motion for judgment as a matter of law pursuant to Rule 50, FRCP. The District Court also ruled that Fennessey could not be held individually liable for monetary damages under the ADEA. The United States Court of Appeals for

the Fourth Circuit affirmed.[3] Petitioners' Petition for a Writ of Certiorari followed.

SUMMARY OF ARGUMENT

The Fourth Circuit's decision does not conflict with any decision of this Court or with any decision of any other Court of Appeals, as urged in the Petition as the basis for this Court invoking its discretionary review power. Rather, the Fourth Circuit carefully analyzed the evidence in the record in this case and concluded on the basis of existing, valid interpretations of the ADEA that the evidence was insufficient to support Petitioners' ADEA claims and, instead, required judgment as a matter of law for Respondents.

The lower courts' further conclusion that an individual cannot be personally liable for monetary damages under the ADEA is a correct construction of the statute which does not conflict with any decision of this Court or with any decision of any other Court of Appeals. This issue is not an important question of federal law which needs to be settled by this Court. Further, in the absence of a grant of the Petition, reversal of the lower court and reinstatement of the verdict, the issue is moot in this case.

[3] The Opinions of the Fourth Circuit and District Court are reproduced in the Appendix to the Petition at pages App. 1-13 and pages App. 14-26, respectively. The Fourth Circuit's Opinion is also published at 30 F.3d 507.

ARGUMENT

I. Reasons for Denial of the Petition

This case presents no issue warranting invocation of this Court's discretionary review powers. The Fourth Circuit's decision is based on its conclusion that the evidence presented by Birkbeck and Richardson in support of their ADEA claims was insufficient as a matter of law to support a jury's finding of intentional age discrimination. The Fourth Circuit's decision in this regard does not conflict with any decision of this Court or with any decision of any other Court of Appeals in its application of the legal standards applicable to its review.

Notably, the Petition is silent as to Rule 50, FRCP, and silent as to the legal standard for granting judgment as a matter of law in ADEA cases. Instead, the Petition contends that the decision conflicts with this Court's decisions in *St. Mary's Honor Center v. Hicks*, 509 U.S. ___, 113 S.Ct. 2742 (1993) and *Anderson v. Bessemer City*, 470 U.S. 564 (1985), as well as with other Courts of Appeals' interpretation of these decisions.

In *Hicks*, this Court addressed the scheme of proof under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and resolved a conflict among the circuits on the proper application of the scheme of proof developed by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and its progeny. This Court held in *Hicks* that rejection of a defendant's claimed nondiscriminatory reason does not compel a finding of discrimination by the factfinder. 113 S.Ct. at 2749. The Court acknowledged further that such a finding of

pretext, coupled with the elements of a *prima facie* case, *may* support a finding of discrimination provided there is an actual finding of intentional discrimination. *Id.* at 2749. *Hicks* did not involve and did not address the role of a court in reviewing a jury verdict pursuant to Rule 50, FRCP, to determine whether there was sufficient evidence to support it, which was the issue before the Fourth Circuit in this case. Nonetheless, Petitioners somehow equate the grant of judgment as a matter of law in this case to be a ruling by the Fourth Circuit in conflict with the *Hicks* decision. Their logic is that since the jury was properly instructed as to the law, the jury must have found both pretext and other evidence of discrimination. The Fourth Circuit's reversal, according to this logic, then constituted the establishment of a "pretext plus" requirement in conflict with *Hicks*.[4] If one agrees with Petitioners' logic, then Rule 50 would become meaningless in cases of this kind, and jury verdicts in discrimination cases would be beyond court review. *Hicks* suggests no such result. To the contrary, this Court in *Hicks* acknowledged the need for court review of findings of fact:

> That the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that plaintiff's proffered reason for race is correct. That remains

---

[4] The dissent in *Hicks* characterized the majority's holding as establishing a "pretext plus" standard. *Id.* at 2762. Presumably, Petitioners contend the Fourth Circuit established a different "pretext plus" standard and one which conflicts with *Hicks*.

> a question for the factfinder to address, subject, of course, to appellate review. . . . *Id.* at 2756.

The asserted conflict between the Fourth Circuit decision and the *Hicks* decision simply does not exist.

Petitioners also contend that the Fourth Circuit's ruling conflicts with this Court's decision in *Anderson v. Bessemer City, supra,* 470 U.S. 564 (1985). Specifically, they point to the statement in *Anderson* that a reviewing court may not "reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." *Id.* at 573. The Petition explains the asserted conflict as follows:

> But this is precisely what happened here, when the jury, who heard Fennessey testify, was convinced that he had lied, but the Court of Appeals held that 'plaintiffs have not introduced any evidence to convince us otherwise.' Petition at pages 11-12.

The Fourth Circuit's actual holding was that Petitioners' evidence was insufficient as a matter of law to establish discrimination. The language Petitioners characterize as the Fourth Circuit's holding was made in this context:

> Fennessey hired a 54 year old worker at approximately the same time he made his allegedly discriminatory statement, and hired a 60 year old worker several years before that. Such hiring practice is significant. As we have stated, 'employers who knowingly hire workers within a protected group seldom will be credible targets for charges of pretextual firing.' Plaintiffs have not introduced any evidence to convince us otherwise. (Citations omitted) 30 F.3d at 513.

Based on this one comment in assessing whether the evidence was sufficient as a matter of law to support a finding of discrimination, Petitioners assert that there is a conflict with *Anderson*. The Fourth Circuit did not rule how it would have interpreted the evidence as a factfinder, but instead concluded that the evidence presented was insufficient as a matter of law for a reasonable jury to find age discrimination. This is the appellate court's function and obligation under Rule 50, FRCP. As quoted above, *Hicks* acknowledged this role, albeit in the context of reviewing findings of fact from a bench trial, and cited *Anderson*. 113 S.Ct. at 2756.

The Petition further seeks a review of whether agents of employers may be personally liable for monetary damages in ADEA cases. There is no conflict among the Courts of Appeals on this issue. The Fourth Circuit in this case and the Ninth Circuit in *Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583 (9th Cir. 1993) are the only Courts of Appeals which squarely address this issue, and both have concluded that an individual cannot be personally liable for monetary damages. The Fifth Circuit and Ninth Circuit have interpreted Title VII's similar language the same way. *Harvey v. Blake*, 913 F.2d 226, 227-228 (5th Cir. 1990); *Padaway v. Palches*, 665 F.2d 965, 968 (9th Cir. 1982). There is no conflict among the circuits, and the issue is not one which rises to the level of an important question of federal law which should be settled by this Court. Moreover, in the context of this case, the issue is moot in

the absence of granting the Petition on the other issues raised, reversal, and a reinstatement of the verdict.[5]

II. Judgment as a Matter of Law for Respondents was Proper Because Petitioners Presented Insufficient Evidence to Support Their Age Discrimination Claims

Petitioners frame the issue in this case as being one of a decision which conflicts with the rulings of this Court and other courts on the scheme of proof and the role of the jury in an ADEA case. The real dispute and the disagreement of Petitioners is with the lower courts' finding that their evidence was insufficient as a matter of law to support a finding of discrimination, notwithstanding the verdict of the jury.

The Petition identifies four aspects of the Fourth Circuit's decision which Petitioners contend conflict with the decisions of this Court or with decisions of other Courts of Appeals: (a) balanced work force / hiring older workers (Petition, p. 15); (b) selections for reductions-in-force (Petition, pp. 15-16); (c) statistics (Petition, pp. 16-17); and (d) Fennessey's remark (Petition, pp. 17-18). Each will be briefly addressed.

The Fourth Circuit acknowledged the existence of an age-balanced work force at Marvel and the hiring by Fennessey of individuals well into the protected class. 30

---

[5] A determination of the latter would have to be made on remand since the lower courts have not addressed Respondents' motion for a new trial in the alternative to judgment as a matter of law. 30 F.3d at 513, n.3.

F.3d at 513. Petitioners cite an Eighth Circuit decision which apparently takes a different view than the Fourth Circuit. *Brown v. Stites Concrete, Inc.*, 994 F.2d 553, 567 n.8 (8th Cir. 1993). Clearly, this dictum in a footnote from one case and in a discussion of an evidentiary point in another does not create a conflict between the circuits on a point of law warranting review by this Court.

Next, Petitioners urge that neither economic difficulties nor a balanced work force immunize an employer from a finding of discrimination. Two cases are cited to support this proposition.[6] The Fourth Circuit never stated otherwise in its decision, and the Petition points to no aspect of the decision which Petitioners claim does so.

The Fourth Circuit rejected Petitioners' statistical evidence for several reasons. One reason was the small size of the statistical pool.[7] 30 F.3d at 511. Petitioners cite First and Fifth Circuit decisions which accepted statistical evidence based on similar size pools. Assuming, *arguendo*, there exists a conflict among the circuits on this point (a proposition with which Respondents disagree due to the highly factual and case-specific nature of evidentiary rulings on statistical evidence), this was just one of the reasons the Fourth Circuit rejected the statistical evidence. The most important reason was that the expert's opinion was based on the presumption that the

---

[6] *Hebert v. Mohawk Rubber Co.*, 872 F.2d 1104 (1st Cir. 1989); *Ayala v. Mayfair Molded Products, Inc.*, 831 F.2d 1314 (7th Cir. 1987).

[7] *Freeman v. Package Machinery Co.*, 865 F.2d 1331, 1338 (1st Cir. 1988); *Bunch v. Bullard*, 795 F.2d 384 (5th Cir. 1986).

two Petitioners were the only two individuals terminated, when in fact they were among fifteen terminated, with over half under the age of 40. Even when considering only the four supervisory employees involved in the reduction, the expert testified that there was no significant connection between age and the four individuals laid off. 30 F.3d at 511.

Finally, Petitioners take exception with the Fourth Circuit's rejection of an alleged age-related remark as evidence of age bias. The statement ("there comes a time when we have to make way for younger people") is characterized by Petitioners as being made by Fennessey in response to Birkbeck expressing concern about his future with Marvel. (Petition, p. 17) More accurately, according to Birkbeck's testimony, this was a statement by Fennessey, himself well into the protected class, in *response* to Birkbeck expressing concerns about his arthritic condition and saying to Fennessey that he "was very, very expertise and could give a lot of expert advice and training to younger people." (J.A. 367) This alleged statement was made almost three years prior to Birkbeck's termination. While the Petition cites several Courts of Appeals' decisions accepting age-related statements as evidence of discrimination under the particular facts of those cases, the Courts of Appeals have unanimously ruled that stray remarks made at a remote time do not constitute evidence of discrimination. *Guthrie v. Tifco Industries*, 941 F.2d 374 (5th Cir. 1991); *Phelps v. Yale Security, Inc.*, 986 F.2d 1020 (6th Cir. 1993); *Frieze v. Boatman's Bank*, 950 F.2d 538 (8th Cir. 1991); *Merrick v. Farmers Insurance*, 892 F.2d 1434 (9th Cir. 1990). There is no conflict among the circuits on this issue.

III. Monetary Liability for Agents of Employers is not Permitted under the Age Discrimination in Employment Act

Respondents have previously addressed why the Fourth Circuit's ruling that Fennessey could not be individually liable for monetary damages does not warrant review by the Court, *supra* at 8-9. Moreover, the Fourth Circuit's ruling is based on the clear language of 29 U.S.C. § 630(b), which limits the Act's coverage to employers who employ more than twenty persons. The lower court correctly ruled that there can be no basis for finding individual liability against an individual who employs no one.

CONCLUSION

The rulings of the lower courts that Respondents are entitled to judgment as a matter of law based on Petitioners' failure to present sufficient evidence to establish a violation of the ADEA were correct. The Fourth Circuit's ruling does not conflict with any decision of this Court or with any decision of any other Court of Appeals. There is no important question of federal law which has not been, but should be, settled by this Court or any other reason to call for an exercise of this Court's power of supervision. Consequently, Respondents

respectfully request that the Court deny the Petition for a Writ of Certiorari filed by Petitioners.

Respectfully submitted,

LOVIC A. BROOKS, III
(Counsel of Record)
KRISTINE L. THOMPSON

CONSTANGY, BROOKS & SMITH
Suite 810, NationsBank Tower
1301 Gervais Street
Columbia, SC 29201-3326
(803) 256-3200

Attorneys for Respondents

Dated: November 21, 1994.